



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 212**

**[Docket DARS-2020-0044]**

**RIN 0750-AL19**

**Defense Federal Acquisition Regulation Supplement: Commercial Item Determinations (DFARS Case 2020-D033)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 that allows a contract for an item using Federal Acquisition Regulation (FAR) part 12 procedures to serve as a prior commercial item determination.

**DATES:** Effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jeanette Snyder, 571-372-6106.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published a proposed rule in the **Federal Register** at 84 FR 65322 on November 27, 2019, DFARS Case 2019-D029, to implement sections 877 and 878 of the National Defense Authorization Act

(NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) and further implement section 848 of the NDAA for FY 2018 (Pub. L. 115-91). DoD published a second proposed rule at 85 FR 74636 on November 23, 2020, DFARS Case 2020-D033, to further implement section 848 of the NDAA for FY 2018 due to substantial statutory changes made after the issuance of the first proposed rule under DFARS Case 2019-D029. Comments received in response to DFARS Case 2019-D029 were addressed in the second proposed rule, DFARS Case 2020-D033.

Section 848 modified 10 U.S.C. 2380(b) to provide that a contract for an item using FAR part 12 procedures shall serve as a prior commercial item determination, unless the appropriate official determines in writing that the use of such procedures was improper or that it is no longer appropriate to acquire the item using commercial item acquisition procedures. On January 1, 2021, 10 U.S.C. 2380(b) was redesignated as 10 U.S.C. 2380(c) in accordance with section 816 of the NDAA for FY 2021 (Pub. L. 116-283). Three respondents submitted comments in response to the proposed rule for DFARS Case 2020-D033.

This final rule does not replace the term "commercial item" with "commercial product" and/or "commercial service" in accordance with section 836 of the NDAA for FY 2019 (Pub. L. 115-232). This change is addressed in DFARS Case 2018-D066, which implements section 836.

## **II. Discussion and Analysis**

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule are provided, as follows:

*A. Summary of Significant Changes From the Proposed Rule*

No changes are made in the final rule as a result of public comments.

*B. Analysis of Public Comments*

*1. Exceptions to Implementation*

*Comment:* A respondent suggested adding examples of what "other evidence" at DFARS 212.102(a)(ii) might include "such as, a contract or correspondence from a contracting officer" to assist contracting officers.

*Response:* DoD acknowledges that examples of "other evidence" may be helpful; however, since it not feasible to provide an all-inclusive list of what might constitute "other evidence," examples may hinder contracting officers' ability to exercise sound business judgment on a case-by-case basis. DFARS 212.102(a)(ii) already provides that the prior contract may be utilized.

*Comment:* Two respondents recommended revising the proposed rule to clarify that if a prior FAR part 12 contract exists, a new commercial item determination is not required, and another respondent indicated the contracting officer should not be required to perform a search of the commercial item database.

*Response:* As a result of a similar public comment received in response to the proposed rule published under DFARS Case 2019-

D029, DFARS paragraph 212.102(a)(iii) was moved to 212.102(a)(ii) to precede the paragraph on commercial item determinations. At the same time, the coverage was rewritten to shift emphasis to the use of prior commercial item determinations and use of prior acquisitions conducted using FAR part 12 commercial item acquisition procedures as a determination. Additionally, there are circumstances in which the prior use of FAR part 12 procedures was for items that were not commercial items but rather items that were only "treated as commercial items" (i.e., procured under the authority of 41 U.S.C. 1903 or 10 U.S.C. 2380a). Therefore, the use of FAR part 12 procedures under these circumstances could not be used as a prior commercial item determination. Furthermore, the applicability of statutory exceptions to treat certain items as commercial is not dependent upon the particular items being purchased; rather it is dependent upon the circumstances of the particular acquisition that cannot be extrapolated to other acquisitions of the same item(s). As such, a contracting officer cannot infer that the use of FAR part 12 procedures means that the acquisition is always appropriate to serve as a commercial item determination, and a review of the commercial item database may be warranted.

*Comment:* A respondent indicated that the exclusion of the use of FAR part 15 procedures for an item or service previously procured using FAR part 12 procedures should be included in this rule.

*Response:* This exclusion was addressed in the final rule at DFARS 212.102(a)(ii)(B)(1).

*Comment:* Two respondents took exception to the requirement for the contracting officer to document the file.

*Response:* Section 848 of the NDAA for FY 2018 modified 10 U.S.C. 2380 to preclude the need for a commercial item determination under certain circumstances. This rule allows for the reliance on a prior commercial item determination or "some other evidence;" therefore, this rule will minimize the contract file documentation required where a prior commercial item determination exists. However, that does not preclude the contracting officer's responsibility to conduct market research and to document the file accordingly.

*Comment:* A respondent recommended the Commercial Item Database reference be placed in DFARS Procedures, Guidance, and Information (PGI) rather than at DFARS 212.102(a)(ii) since section 848 of the NDAA for FY 2018 does not address it.

*Response:* Although the Commercial Item Database is not referenced in section 848 of the NDAA for FY 2018, it is mandated by 10 U.S.C. 2380(a); therefore, it is appropriate to reference it at the DFARS level.

## *2. Outside the Scope of the Rule*

*Comment:* A respondent indicated the requirement to obtain higher level approval at DFARS 212.102(a)(iii)(C) should be removed.

*Response:* The higher level approval at DFARS 212.102(a)(iii)(C) is applicable when the "Prior use of FAR part 12 procedures" at DFARS 212.102(a)(ii) is not applicable, and the commercial item determination relies on paragraphs (1)(ii), (3), or (4) of the "commercial product" definition at FAR 2.101 or paragraph (2) of the "commercial service" definition at FAR 2.101. The requirement for higher level approval was added to the DFARS on March 12, 2012, as a result of a recommendation of the Panel on Contracting Integrity included in its 2009 Report to Congress concerning compliance with the DFARS documentation requirements for commercial item determinations. In its report, the Panel concluded that determinations were not always sufficiently documented; therefore, the DFARS was modified to require approval at one level above the contracting officer for commercial acquisitions that are based on "of a type" commercial procurements or items "offered for sale" but not yet sold to the general public. This approval does not conflict with the changes made to 10 U.S.C. 2380 by section 848 of the NDAA for FY 2018, and the basis for it is still valid.

*Comment:* A respondent recommended the Commercial Item Database be expanded to include information regarding commercial awards.

*Response:* 10 U.S.C. 2380(a) sets forth the requirements for the Commercial Item Database, whereas information regarding contract awards is available via other means such as the Federal Procurement Data System; therefore, it is not necessary to

expand the Commercial Item Database to replicate data available elsewhere.

*C. Other Changes*

DFARS 212.102(a)(iii) is modified to specify that commercial item determinations are only required for acquisitions that exceed the simplified acquisition threshold (SAT). The proposed rule eliminated the \$1 million threshold for commercial item determinations, which was based on policy to avoid overly burdensome requirements on lower dollar value acquisitions. If contracting officers are accepting prior use of FAR part 12 procedures, even below \$1 million, as a commercial item determination for subsequent buys, then it is necessary to apply the same standards at any dollar value, as these determinations can form the basis for much larger acquisitions. However, requiring commercial item determinations for acquisitions between the micro-purchase threshold and those at or below the SAT would impose an overly burdensome requirement for Government personnel. DoD also recognizes the elimination of the \$1 million threshold could result in an administrative burden on contractors if the requirement for a commercial item determination is imposed at or below the SAT. Therefore, DFARS 212.102(a)(iii) is modified to reflect the internal operating procedures of the Government to specify that commercial item determinations are only required for acquisitions that exceed the SAT.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold, for Commercial Products Including Commercially Available Off-the-Shelf Items, and for Commercial Services**

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including commercially available off-the-shelf items, or for commercial services.

### **IV. Expected Impact of the Rule**

This final rule is expected to benefit the Government and contractors as it streamlines FAR part 12 and commercial item determination processes and procedures. Since this rule will allow a contracting officer to rely on a prior commerciality determination in the Commercial Item Database, a prior contract, or other evidence that an item has previously been procured by DoD using commercial item acquisition procedures under FAR part 12, it will preclude the need to prepare a commercial item determination and, as such, preclude the need for contractors to provide information to the Government to support a commercial item determination. Therefore, this rule is expected to benefit both the Government and contractors. Given that this rule streamlines internal Government processes and procedures and, as a consequence, benefits contractors, there is no expected cost to contractors.

## **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

## **VI. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

## **VII. Regulatory Flexibility Act**

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This final rule is necessary in order to further implement section 848 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018, which modified 10 U.S.C. 2380(b) (redesignated, as of January 1, 2021, as 10 U.S.C. 2308(c) in accordance with section 816 of the NDAA for FY 2021 (Pub. L. 116-283)). The objective of this rule is to address the use of Federal Acquisition Regulation (FAR) part 12 procedures and commercial item determinations. If the DoD Commercial Item Database contains a prior commercial item determination, or the contracting officer has other evidence that an item has previously been acquired by DoD using commercial item acquisition procedures under FAR part 12, the prior contract shall serve as a determination that an item is a commercial item.

No significant issues were raised by the public comments received in response to the initial regulatory flexibility analysis.

DoD awarded an average of 24,446 new contracts to an average of 11,297 unique entities (including 7,344 small businesses) each year from FY 2018 through FY 2020. However, this rule is not expected to have a significant impact on small entities because the rule is not implementing any requirements with which small entities must comply. This rule impacts Government

internal operating procedures for commercial item determinations for products and services offered to the Government.

This final rule does not impose any new reporting, recordkeeping, or other compliance requirements.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact on small entities, because no significant impact is expected. Any impact is expected to be beneficial.

### **VIII. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### **List of Subjects in 48 CFR Part 212**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 212 is amended as follows:

### **PART 212—ACQUISITION OF COMMERCIAL ITEMS**

1. The authority citation for part 212 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Revise section 212.102 to read as follows:

#### **212.102 Applicability.**

(a)(i) *Use of FAR part 12 procedures.* Use of FAR part 12 procedures is based on—

(A) A determination that an item is a commercial item (see paragraph (a)(iii) of this section); or

(B) Applicability of one of the following statutes that provide for treatment as a commercial item and use of FAR part 12 procedures, even though the item may not meet the definition of "commercial product" or "commercial service" at FAR 2.101 and does not require a commercial item determination:

(1) 41 U.S.C. 1903 - Supplies or services to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack pursuant to FAR 12.102(f).

(2) 10 U.S.C. 2380a - Supplies or services from nontraditional defense contractors pursuant to 212.102(a)(iv).

(ii) *Prior use of FAR part 12 procedures.* (A) Pursuant to 10 U.S.C. 2380(c), except as provided in paragraph (a)(ii)(B) of this section or unless the item was acquired pursuant to paragraph (a)(i)(B) of this section, if the Commercial Item Database (for website see PGI 212.102(a)(iii)(B)(4)) contains a prior commerciality determination, or the contracting officer has other evidence that an item has previously been acquired by DoD using commercial item acquisition procedures under FAR part 12, then the prior contract shall serve as a prior determination that an item is a commercial item. The contracting officer shall document the file accordingly.

(B)(1) If the item to be acquired meets the criteria in paragraph (a)(ii)(A) of this section, the item may not be

acquired using other than FAR part 12 procedures unless the head of the contracting activity issues a determination as specified in paragraph (a)(ii)(B)(2)(ii) of this section.

(2) Pursuant to 10 U.S.C. 2306a(b)(4)(A), the contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item. In accordance with 10 U.S.C. 2306a(b)(4) and 10 U.S.C. 2380(c), if the contracting officer questions a prior determination to use FAR part 12 procedures and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than FAR part 12 procedures, the contracting officer shall request a review by the head of the contracting activity that will conduct the procurement. Not later than 30 days after receiving a request for review, the head of the contracting activity shall—

(i) Confirm that the prior use of FAR part 12 procedures was appropriate and still applicable; or

(ii) Issue a determination that the prior use of FAR part 12 procedures was improper or that it is no longer appropriate to acquire the item using FAR part 12 procedures, with a written explanation of the basis for the determination.

(iii) *Commercial item determination.* Unless the procedures in paragraph (a)(ii) of this section are applicable, when using FAR part 12 procedures for acquisitions of commercial items pursuant to

212.102(a)(i)(A) that exceed the simplified acquisition threshold, the contracting officer shall—

(A) Determine in writing that the acquisition meets the commercial product or commercial service definition in FAR 2.101;

(B) Include the written determination in the contract file;

(C) Obtain approval at one level above the contracting officer when a commercial item determination relies on paragraph (1)(ii), (3), or (4) of the “commercial product” definition at FAR 2.101 or paragraph (2) of the “commercial service” definition at FAR 2.101; and

(D) Follow the procedures and guidance at PGI 212.102(a)(iii) regarding file documentation and commercial item determinations.

(iv) *Nontraditional defense contractors.* In accordance with 10 U.S.C. 2380a, contracting officers—

(A) Except as provided in paragraph (a)(iv)(B) of this section, may treat supplies and services provided by nontraditional defense contractors as commercial items. This permissive authority is intended to enhance defense innovation and investment, enable DoD to acquire items that otherwise might not have been available, and create incentives for nontraditional defense contractors to do business with DoD. It is not intended to recategorize current noncommercial items; however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of “nontraditional defense contractor” even

though they have been established under traditional defense contractors. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial item determination and does not mean the item is commercial;

(B) Shall treat services provided by a business unit that is a nontraditional defense contractor as commercial items, to the extent that such services use the same pool of employees as used for commercial customers and are priced using methodology similar to methodology used for commercial pricing; and

(C) Shall document the file when treating supplies or services from a nontraditional defense contractor as commercial items in accordance with paragraph (a)(iv)(A) or (B) of this section.

(v) *Commercial item guidebook.* For a link to the commercial item guidebook, see PGI 212.102(a)(v).

**Subpart 212.70 [Removed and Reserved]**

3. Remove and reserve subpart 212.70, consisting of sections 212.7000 and 212.7001.